SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 162

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Petitioner and Appellee Below,

vs.

C. F. GREEN, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW AND INDIVIDUALLY, AND D. L. MORROW AND FRED W. NELSON, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW AND INDIVIDUALLY,

Respondents and Appellants Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The original opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in —— F. (2d) —— (R. 359). The opinion of the trial court together with findings of fact and conclusions of law is reported in 34 Fed. Supp. 30 (R. 336).

II.

Jurisdiction.

All allegations pertaining to jurisdiction appear in the petition for writ of certiorari in Paragraph II thereof, which is hereby adopted and made a part of this brief.

III.

Statement of the Case.

Inasmuch as a summary of the case has been set forth in Paragraph I of the preceding petition for writ of certiorari, said Paragraph I is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Eighth Circuit erred in reversing this case and remanding it to the trial court with directions to retain the bill pending a determination of proceedings to be brought in the Iowa State courts with reasonable promptness, upon the authority of *Railroad Commission of Texas, et al.*, v. *Pullman Company, et al.*, 312 U. S. ——, 61 S. Ct. 643, 85 L. Ed. 580, and in refusing to pass on the merits of the case.

V.

ARGUMENT.

A. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Court.

The following language appears in the decision of the Circuit Court of Appeals (R. 363):

> "The action is in equity, and its purpose is to enjoin the appellants, who are State officers, from enforcing a

taxing statute of the State of Iowa which they regard as applicable to certain of the operations of the Phillips Petroleum Company at the bulk plants in suit. The sole question presented is one of Iowa law, as to which neither the Supreme Court of Iowa nor any other court of that State has ruled. * * * The last word on the meaning of the Act and on its applicability to the operation of bulk plants such as those in suit belongs to the Supreme Court of Iowa. * * * This decision [Pullman case] of the Supreme Court requires, as we understand it, in a case such as this,—where the question upon which the case turns is one of state law as yet undetermined by the courts of the state and affecting an important state policy such as that of taxation—that the federal district court as a court of equity *must*, in the exercise of a wise discretion and because of '"scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary,' (Ibid., p. — of — U. S., page 645 of 61 S. Ct.) stay its hands, provided that the situation is such that a definitive determination of the issue of state law may be obtained by the parties through recourse to the state courts. We gather that the exercise of this discretion is a matter of judicial policy which cannot be controlled by the wishes or agreements of the parties litigant." (Emphasis supplied.)

The result of this decision is that a United States District Court sitting as a court of equity cannot determine in a suit for injunctive relief the applicability of a State taxing statute to any factual situation where the identical question has not been passed upon by the State courts, regardless of the fact that judicial code, § 24 (1), as amended, 28 U. S. C., § 41 (1), 28 U. S. C. A., § 41 (1), specifically provided for the determination of this particular kind of litigation instituted prior to August, 1937.

Such a decision is directly in conflict with *Fox* v. *Standard Oil Company of New Jersey*, 294 U. S. 87, in which this Court, in a suit for injunctive relief, thoroughly reviewed

a complicated factual situation relating to gasoline and oil retail service stations and bulk storage plant operations, and construed, interpreted, and applied a West Virginia Chain Store Tax Act thereto, although this statute had not yet been passed upon by the West Virginia State courts. This Court held that the State taxing statute was applicable to the factual situation under consideration and that the statute did not violate the State or Federal constitutions, and denied injunctive relief. The following language was used by the court in discussing its interpretation of the State statute:

> "The complainant was at liberty to maintain a suit in the state courts, where the meaning of the statute could have been determined with finality. It chose to have recourse to the courts of the nation. In such circumstances we are charged with a duty of independent judgment * * *" (l. c. 96, 97).

The *Fox* case is practically identical in all respects with the case at bar as originally instituted, and this Court did not hesitate to construe and apply a State taxing statute which had not been previously construed and applied by the State courts—which is exactly what the Circuit Court of Appeals for the Eighth Circuit has said that it is forbidden to do in the case at bar.

In *Driscoll* v. *Edison Light & Power Company*, 307 U. S. 104, an appeal from a decree of a three-judge district court granting a permanent injunction against the enforcement of temporary utility rates, this court construed, interpreted, and applied certain State statutes which had not yet been interpreted by the State courts. In this connection the court said:

> "Appellee's first contention is that the decree may be sustained for the sole reason that the commission should have proceeded under subsection (b) [§ 310 (b) Pennsylvania Public Utility Act] because the appellee

> does not have continuing property records. As the conclusion of the lower court on this point *is not supported by a state decision, we analyze for ourselves the provisions of the sections*" (l. c. 112). (Emphasis supplied.)

Thus, this Court has again very recently not refused to consider a request for injunctive relief merely because the State court had not previously construed or interpreted a pertinent State statute in an identical factual situation.

In *Thompson* v. *Consolidated Gas Utilities Corporation, et al.*, 300 U. S. 55, the respondents had obtained an injunction from a three-judge district court restraining the enforcement by State authorities of a gas proration order. Upon appeal this Court sustained the granting of the injunction and in so doing it was necessary to interpret and construe a State statute which had not at that time been construed and interpreted by the State courts of Texas. In this connection, the following language was used by Mr. Justice Brandeis:

> "* * * No court of the State has construed the act. The defendants might, perhaps, have secured its construction by the state court. For the amendment of section 266 of the Judicial Code made in 1913, 28 U. S. C. A., Sec. 380, provides that upon the institution of an appropriate suit in a state court a stay may be had of the proceedings in the federal court to await adjudication by the state court. But no suit in a state court was instituted by the defendants to that end. *When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws*" (l. c. 74, 75). (Emphasis supplied.)

Thus, in an important case involving conservation of a great natural resource, this Court did not refuse to grant injunctive relief merely because it was necessary for it to interpret and apply a State statute which had not been previously passed upon by the State courts.

The *Fox, Driscoll,* and *Thompson* cases, *supra,* are examples of instances where this Court has in equity cases, in the absence of an interpretation of a State statute by a State court, placed its own construction thereon and followed its own interpretation thereof. The *Fox* case, *supra,* involved questions of State taxation. Moreover, it is probable that matters of gas proration, as in the *Thompson* case, and utility rates, as in the *Driscoll* case, are matters of no less important State policies than are matters of taxation.

Railroad Commission of Texas v. *The Pullman Company, Supra, Did Not Overrule the Above Cited Cases.*

It cannot be denied that the decision of the Circuit Court of Appeals is not only "probably" in conflict with the above cited decisions of this Court, but is directly in conflict therewith unless it can be said that *Railroad Commission of Texas, et al.,* v. *Pullman Company, et al., supra,* has overruled the above cited decisions. They were not referred to in the opinion and, if they are overruled, it must be by implication.

Railroad Commission of Texas, et al. v. *Pullman Company, et al., supra,* is distinguishable from the *Fox, Driscoll,* and *Thompson* cases. It would be presumptuous to attempt to advise this Court of the significance and meaning properly attributable to the *Railroad Commission* case, *supra,* as this Court knows better than any member of the bar what was intended by that decision. There was involved therein possible contact with a "sensitive area of social policy" of the State of Texas, to wit: a possibly unauthorized order of the Railroad Commission of Texas re-

sulting in a probable discrimination between white and colored residents and citizens of the State of Texas. No such delicate issue peculiar to the particular State from which the case arose was involved in the *Fox, Driscoll,* and *Thompson* cases, which are classic examples of instances in which Federal courts of equity have always exercised their equitable jurisdiction. Further, in the *Railroad Commission* case, *supra,* the very statute empowering the Railroad Commission specifically provided a complete and comprehensive statutory method of reviewing orders of the Commission in the Texas State courts. In the *Fox* case, *supra,* "an imperfect remedy at law" existed which necessitated recourse to a court of equity. In the *Driscoll* case, *supra,* it was not suggested that there was any absence of equity jurisdiction. In the *Thompson* case, *supra,* the State authorities failed to avail themselves of the opportunity provided by statute of obtaining a stay of proceedings in the Federal court until the questions could be determined in appropriate proceedings in a State court.

Likewise, the *Railroad Commission* case, *supra,* is clearly distinguishable from the case at bar because: (1) in the *Railroad Commission* case, *supra,* the statute granting the Railroad Commission its powers provided "easy and ample means for determining the Commission's authority", whereas in the case at bar there was not only an inadequate remedy at law but *no* remedy at law, as evidenced by absence in the Iowa Chain Store Tax Act, or in any other Act, of any provision for appeal from unfavorable rulings of the Tax Commission, and absence of refund provisions for taxes illegally exacted; (2) in the *Railroad Commission* case, *supra,* a Federal constitutional question existed on which a decision might have been "tentative" or unnecessary because of possible subsequent decisions by the Texas State courts denying the Commission's power to

make the ruling complained of, whereas in the case at bar no Federal constitutional question existed at the time of trial; (3) in the *Railroad Commission* case, *supra,* there was involved an interference in or contact with a "sensitive area of social policy of the State of Texas" concerning alleged racial discrimination with significant public consequences attached thereto, whereas in the case at bar there was involved merely a State taxation problem; and (4) in the *Railroad Commission* case, *supra,* only one question was originally presented for determination, whereas in the case at bar the District Court, by the entry of the consent decree, had determined all questions between fourteen of the original parties to this action and there was left for determination the sole question of the application of the taxing statute to certain bulk storage plant operations of petitioner, in which a decision was sought by the agreement of all parties. In other words, this case presents the question of whether or not a Federal district court which has decided the major issues in a case by consent and retained jurisdiction to try a single issue in a case, must stay its hand and remit that feature of the case to the State courts for decision, thereby tearing the case apart and making it into separate actions. Then what becomes of the rule that a Federal court having taken jurisdiction will retain it to decide all issues?

An extended discussion of the *Railroad Commission* case, *supra,* would serve further to clarify the distinctions between the case at bar and previous decisions by this Court. Petitioner submits that the foregoing analysis discloses that in this decision the Circuit Court of Appeals for the Eighth Circuit has decided a Federal question in a way not only "probably" but *directly* in conflict with applicable decisions of this Court.

In any event, this Court should accept jurisdiction of this case with a view of clarifying the situation by reconciling

the *Railroad Commission* case with the *Fox, Driscoll,* and *Thompson* cases, or announcing the overruling or modification of those cases.

B. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

Under this decision Federal equity courts can no longer exercise their equity jurisdiction in any case where there is involved an interpretation or application of a State statute not previously interpreted or applied by the State courts, as long as *any* kind of remedy either at law *or* equity is available in the State courts. This is a radical departure from former long standing practice. This also is a denial to citizens of different States of the right granted by United States statute to submit to Federal courts their controversies whether at law or in equity. Heretofore, this right has never been questioned in cases like the case at bar, traditionally and properly ~~justifiable~~ justiciable in Federal equity courts.

This decision will effect a discrimination between citizens whose rights can be determined in cases at law and citizens whose rights can be determined only in equitable proceedings. If the Iowa Chain Store Tax Act had provided for payment of tax under protest and for the subsequent institution of a suit at law to recover such tax, then the district court in a proper action would unquestionably have interpreted and applied the Iowa statute regardless of lack of a State court decision thereon. The Circuit Court of Appeals in its decision in the case at bar makes it impossible for parties seeking equitable relief to obtain such relief where to decide the case it is necessary for the Federal court to interpret a State statute which has not previously been interpreted by the State courts.

Moreover, in view of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, the logical result of the rule announced by the Circuit Court

of Appeals would be that Federal courts of equity are powerless to decide any question of *state common law* in the absence of an authoritative State court decision.

Petitioner submits that if the Circuit Court of Appeals is correct in its interpretation and application of the *Railroad Commission* case, *supra,* then this Court should so declare in unequivocal language. Therefore, this important question of Federal law, a question which has never heretofore existed or been raised and now is made important for the first time by this decision of the Circuit Court of Appeals, has never actually been settled by this Court but should be settled by an opinion definitely and actually limiting the effect of the principles of the *Railroad Commission* case, *supra,* to cases of that type.

C. The Circuit Court of Appeals Has Rendered a Decision in Conflict With Other Circuit Courts of Appeal on the Same Matter.

The excerpt from the decision set out in full in Point A of this argument clearly shows that the court ruled that in an equity case it will not interpret or construe a State statute which has not been construed or interpreted by the State courts. This is a radical departure from well established present practice, not only in the Eighth Circuit Court of Appeals, but in the Circuit Court of Appeals for the Ninth Circuit and other circuits.

In *Haskell* v. *McClintic-Marshall Co.,* 289 Fed. 405, the Circuit Court of Appeals for the Ninth Circuit in an equitable proceeding instituted by the respondent to foreclose a mechanic's lien, remanded the case to the court below for further proceedings therein. It was necessary for the Circuit Court of Appeals to interpret the mechanic's lien

statute of the State of Washington which had not been passed upon by the Washington courts. The court said:

> "It must be conceded, however, that the exact point here presented has never been determined by the Supreme Court of the state, and it becomes the duty of this court to determine the question for itself as best it can. The language of the statute is:
>
> " 'Every person performing labor * * * has a lien * * * for the labor performed * * *' Section 1129, Rem. & Bal. Code.
>
> "The statute does not use the term 'delivered' * * *. This construction of the statute is reasonable and just; it protects all and injures none" (pp. 412-413).

Thus, the Circuit Court of Appeals for the Ninth Circuit in an equity case did not hesitate to interpret, construe, and apply a State statute in the absence of prior interpretation by the Washington State court.

It has also been the long established custom of the Circuit Court of Appeals for the Eighth Circuit to construe State statutes in equity cases where such statutes have not been interpreted by the State courts. See *Davis* v. *Mills Novelty Co.*, 70 F. (2d) 424, 426, and *Kansas City, Missouri* v. *Johnson*, 70 F. (2d) 360, 361.

It has long been a settled practice in various Circuit Courts of Appeal to apply and construe State statutes which have not yet been interpreted by State courts in proceedings at law. The following cases are examples of such decisions:

Samuels v. *Quartin* (C. C. A. 2, N. Y.), 108 F. (2d) 789, 791, a bankruptcy proceeding;

Equitable Life Assurance Society of the United States v. *First National Bank of Birmingham* (C. C. A. 5, Ala.), 113 F. (2d) 272, 273, a suit at law on an insurance policy;

Doethlaff v. *Penn Mutual Life Insurance Co.* (C. C. A. 6, Ohio), 117 F. (2d) 582, 584, a bankruptcy case; and *Pryor* v. *National Lead Company* (C. C. A. 8), 87 F. (2d) 461, 463, a common law personal injury action.

In the above cases various Circuit Courts of Appeal have not refused to determine questions submitted to them either in equity or at law merely because there was involved an interpretation of a State statute which had not received a prior construction by the State courts. The Circuit Court of Appeals for the Eighth Circuit predicated its refusal to decide the case at bar upon its merits upon the fact that the Iowa State courts had not interpreted or construed the Iowa Chain Store Tax in a factual situation comparable to the one submitted. Thus, the decision in the case at bar is in conflict with decisions by other Circuit Courts of Appeal on the same matter.

Conclusion.

The case at bar is one calling for the exercise of the supervisory powers of this Court for a writ of certiorari for the review of the decision by the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

PHILLIPS PETROLEUM COMPANY,
By H. D. EMERY,
RAYBURN L. FOSTER,
Bartlesville, Oklahoma,
Counsel for Petitioner.

WALTER L. BARNES,
Bartlesville, Oklahoma,
PAUL J. PARKER,
Des Moines, Iowa,
Of Counsel.